to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that as to the previous rents and profits there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

It may well be that the Bank has an interest in the fund during the time the employee continues in the Bank (as for instance as a security against possible defalcations) which would take the case out of the authority of *Gosling* v. *Gosling* but such a case has not been raised on the Bank's behalf and I am not able to consider it.

The Official Assignee standing as he does in the shoes of the Bankrupt has in my opinion a right to call for payment of the money.

The Bank have however advanced to the Bankrupt a sum of about $4,500 but I have not been told exactly what is due to the Bank in this respect. I consider that this sum is in effect a part payment to the Bankrupt of the money held in trust for him and should therefore be deducted from the amount payable to the Official Assignee.

I therefore order that the Bank do pay to the Official Assignee the sum of £2,550.10.5 less such sum as has been already advanced to the Bankrupt.

Official Assignee's costs to be paid by the Bank. Stay of execution for 14 days and if notice of appeal given then until further order.

Order accordingly

Solicitors for the Creditors—*Braddell Bros.*

Solicitors for the Bank—

Donaldson & Burkinshaw.

[POLICE COURT SPECIAL JURISDICTION]

SHAIK SAHIB BIN OMAR BIN ABDULLAH BIN OMAR MAKARIM

v.

THE MUNICIPAL COMMISSIONERS

[S'PORE DISTRICT COURT CASE No. 3254 OF 1931]

Damage to land—Compensation—Summary jurisdiction of District Court—"Injurious affection"—Benefit by construction of drain—Betterment—Commissioners not entitled to set-off—Principle of assessing damages—Laches—Ordinance No. 135 (Municipal) Secs. 129 & 362—Land Acquisition Act, S. 63—Victoria Lands Compensation Act of 1859, S. 35.

Where a piece of land is detrimentally affected by the construction through it of a large drain by the Municipal Commissioners, it is no answer to a claim by the owner for compensation that the value of the land has improved as a result of their action as betterment or enhanced value cannot be set off against damages.

The delay on the part of the owner of the land in commencing proceedings against the Municipality, unless the claim is one that is barred by limitation, does not deprive him of the right of action.

The facts and arguments fully appear from the judgment.

Laycock for the Claimant.

Robinson for the Municipal Commissioners.

Cur. Ad. Vult.

9.6.32.

DODD, D.J.—This is a claim by the owner of land known as Lot 340 in Changi Road against the Municipal Commissioners, Singapore, for compensation for damage to his land by the building through it of a large drain.

Section 129 of Ordinance 135 gives the Commissioners power to build such a drain and lays down that full compensation shall be made for any damage done, and Section 362 gives a District Court summary power to decide any question of liability and the amount of any compensation or damages it may direct to be paid.

The Plaintiff claims that he has been damaged by the loss of the land occupied by the drain. He further claims that he has suffered damage by the loss of 10 feet on either side of the drain owing, he alleges, to the fact that the Commissioners would not in practice allow him to build within 10 feet of a drain or alternatively that a wise architect would not advise building within 10 feet of the drain.

According, however, to the layout of Plaintiff's expert witness Major Keyes only one side of the drain would have to be sacrificed for these reasons. We may therefore take it that the further claim is for 10 feet on one side of the drain only.

The Defendants deny that the Plaintiff has suffered any damage at all alleging that the Plaintiff's land has been improved by the construction of the drain.

The area occupied by the drain is admitted to be 10,236 square feet.

The Plaintiff claims that the value of the land taken at the date material to this case was 50 cents a square foot. The Defendants contend that the value was 20 cents a square foot.

I will consider first upon what principle in my opinion damage should be assessed.

The Plaintiff contends that compensation should be awarded for the damage he has actually sustained by the loss of his land and that the Defendants cannot set off against this damage any improvement which may have accrued to the land as a result of the drain. He quotes in support of this contention the opinion of authorities and the decisions of the English Courts on similar sections in other Statutes or Acts.

(I will deal later with the question whether such decisions on sections not identical with the sections in our Ordinance, are binding on this Court).

Balfour Brown in The Law of Compensation, 2nd Edition ,page 108, in commenting on Section 63 of the Land Clauses Act 1845 states:—"There is no provision in the Land Clauses Act allowing promoters to set off against any owner's claim for compensation for severance or other injurious affection that the value of the land will be enhanced by reason of the use of the land taken by the promoters."

The point was raised in *Senior* v. *Metropolitan Railway Company* (2 H. & C. page 258). In that case both Bramwell J. and Wilde J. say they "doubt" whether such a set off can be made. The remarks of Wilde J. in the last paragraph of his judgment seems to me especially applicable. If the Defendant in this case is allowed to set off the benefit to the land derived from the drain (which admittedly is part of a scheme benefiting a wide district beyond the Plaintiff's land), then one individual the Plaintiff is being made to pay something for that benefit whereas his neighbour would pay nothing.

Ealge v. *Charing Cross Railway Co.* (L. R. 2 Common Pleas page 638) which also deals with Section 63 of the Land Clauses Act is further authority that if injurious affection is proved the owner is entitled to compensation and it is no answer that by reason of accidental circumstances the saleable value of the premises was not diminished.

Where, however, as in the Victoria Lands Compensation Act of 1859 (the interpretation of Section 35 of which came before the Court of Appeal in the case of *Harding* v. *Board of Lands and Works* (1886) (21 A. C. 208) provision is made that regard shall be had to the enhancement of value of the adjoining land belonging to the person to whom compensation is to be made the Privy Council held this to mean that where there is injurious affection and also enhancement in value of adjoining land the one should be set off against the other.

The Plaintiff's contention, therefore, is that unless there is statutory provision to that effect enhancement of value cannot be set off against injurious affection.

Counsel for the Defendants argues that the rulings on these cases are not binding on this Court as they are rulings on totally different sections. My own opinion is that these sections are *in pari materia* with our sections and that I should

be bound by the rulings on them of the English Courts.

The term "injurious affection" is used in the cases quoted and the word "damages" is the term used in our section. The Plaintiff contends (I think rightly) that they are to all intents and purposes synonymous.

It seems to me reasonable to regard "injurious affection" as a synonym of Damages. Injury may be "*sine damno*" or may result in damages. It is only where it results in damages that any substantial claim can arise under the Acts quoted above.

On the other hand "injuriously" in the phrase "injuriously affected" cannot have precisely the same connotation as the word "injury" usually has. Injury is essentially a wrong. But as Bramwell J. says in *McCarthy* v. *Metropolitan Board of Works* (42 L.J.C.P. 93, 94) "Injuriously affected does not mean wrongfully affected. What is done is rightful under the powers of the Act. It means hurtfully or 'damnously' affected . . . . At the same time I am clearly of the opinion that to entitle the parties to compensation the injury or hurt must be such as could not be lawfully inflicted except by the powers of the Act."

This is no more than to say that the injurious affection must be such that if it were not for the Act it would be an injury which would give rise to an action for damages. The owner is in the same position *vis-a-vis* the promoters as he would be *vis-a-vis* a private person whose injury caused damage to his land. Or a Counsel for the Plaintiff puts it—the Commissioners but for the Ordinance would be in the position of trespassers.

All through the authorities quoted it is the damage that is the main point under consideration and damage seems to be regarded in the learned judgments as practically synonymous with injurious affection.

For all these reasons I am of opinion that Section 63 of the Land Acquisition Act and Section 35 of the Lands Compensation Statute of the Colony of Victoria are manifestly *in pari materia* with Sections 129 and 362 of our Ordinance 135.

I, therefore, hold that the Plaintiff has made his point that Betterment or enhanced value cannot be set off against damages.

I have, therefore, to decide what damages if any the Plaintiff has suffered from the loss of his land.

There are two other points I should mention before I review the evidence. The first is the question of future damage. I think the case of *Ratepayers of Colac Summerfield* 1893 A.C. page 187 which is a ruling on Section 384 of the Local Government Act Victoria (which section again seems to me to be *in pari materia*) makes it clear that present and future damage should be assessed now "once and for all." But in so assessing damage I feel I should consider carefully the possible remoteness of any claim to future damages.

The second point is the suggestion by Counsel for the defence that the Plaintiff has shown a lack of diligence in starting litigation and that it was only after a demand from the Commissioners for payment of his contribution to the make up of Telok Kurau Road that this present claim was put forward.

I do not think that this is an instance of "laches" and unless the Plaintiff's claim is barred by Limitation I cannot see that delay in starting proceedings can weigh in any degree against the Plaintiff. Such delay might be due to a number of causes, such as lack of funds, ignorance of law, &c.

I will now review the evidence of the witnesses.

The Plaintiff calculates the amount of damage he has sustained by considering the extent to which the natural development of his land has been hindered by the building of this drain.

The witness Keyes gives it as his expert opinion that the natural development of the land would be by building shop houses thereon. He points out that there is no shopping centre in the district and lays stress upon the possibility of the

development of the Malay Settlement which is about a mile away on the opposite side of the Changi Road.

With these ideas in his mind he gives us a layout (Ex. E) of shop houses with a road in the centre which he consider to be the best layout for the land.

From the evidence of the other experts and from my own examination of the land and the locality I do not myself feel convinced that this layout would be commercially the best method of developing the land. The argument that the land is more suitable for bungalow development than shop houses seems to me a sounder proposition. It is in fact now "zoned" as a bungalow area. There is little evidence apart from the opinion of this witness of the need of a shopping centre there now or in the near future and I find that the success or failure of the Malay Settlement and its effect on the possible utility of this land is too remote a consideration to weigh in an estimate of the damage resulting from this drain.

I do not, therefore, propose considering in detail this layout as in my opinion the witness' conclusion that such layout is the best is based on doubtful premises.

His estimate of 40 cents per square foot is apparently based on his scheme of layout which would account for its being so much higher than that of other experts.

He admits that the value of the remaining land has not decreased as a result of the building of the drain.

I was not very impressed by the witness Mayhew. He does not say much more than that a drain ploughed through a man's land must cause damage, which *prima facie* would, I think, be the opinion of any layman. He says little to substantiate his estimate of 50 cents per square foot.

These are the only two expert witnesses called by the Plaintiff.

The witness Cunnell is called by the Defence chiefly to rebut the contention that the Municipality would disallow building within 10 feet of a drain. As far as Municipal Bye-Laws go there is no power to disallow such building. But in view of my opinion of the evidence of Major Keyes and his layout the point does not seem to me very material.

The witness Gardner deals with the same point.

The witness Zuzarte goes to prove betterment of the land as a result of the drain. The value of his evidence to me therefore, depends on my view of the question of betterment as against damages which I have considered elsewhere.

The witness Fraser is again a critic of the Keyes layout and of the possibility of the need of shop development on this or any neighbouring site to meet the needs of the Malay Settlement and the locality generally. His evidence also goes to show that the "zoning" of an area may vary with the policy of the Town Improvement Trust or the Munitipality which policy is not necessarily continuous. Here again I think the possibilities of such variations are too problematical and remote for me to form an opinion on their effect on the future development of the land.

The witness Snell's evidence is important as upon it the Defendants base in great measure their valuation of the land. The witness has been an assessor and engaged in land valuation in Singapore for the last five years. It is true that

his experience has been gained in his capacity as a Municipal servant and that therefore one may expect him as a matter of habit to assess value within reason at as low or as high a figure as may suit the interests of his employers. And I recognise that in this case it is to the interest of his Employers to assess the value of this land as low as possible. Making due discount for this I was, nevertheless, impressed by his evidence He seems to me to have come to his figure by the most scientific method open to him—i.e. by corroborating his own expert opinion by the evidence of as recent sales in the neighbourhood as he can find. On these principles he has valued the land at the time material to this case at 20 cents per square foot. He was not seriously shaken in cross-examination.

The witness Atkin-Berry arrives at the same figure by estimating what would be a reasonable return for capital laid out in developing the land in accordance with what he considers to be the best scheme. He argues that the natural development would be by building small bungalows on lots of about a quarter of an acre. As I have said above it does seem to me after weighing all the expert evidence I have heard and viewing the land and the locality myself the development advocated by the Defendants' witnesses is the most natural and probable.

This witness and the remaining two (Taylor and Edmonds) also give evidence as to betterment I do not therefore propose reviewing their evidence any further.

I have not referred much to the legal arguments of learned Counsel for the Defendants. His case substantially (though he not very emphatically seems to repudiate at times the argument of "betterment") seems to me to be that the land has been improved as a result of the drain and that this improvement should be set off against the loss of the land occupied by the drain. But I cannot find that he has quoted any authority to justify this method of assessing compensation. The weight of authority as I have indicated above seems to me in favour of the view that betterment cannot be set off against damage.

For these reasons I find that the Defendants are liable for damages. The area of 10,236 square feet is admitted. I accept the figure of 20 cents per square foot and assess the damage to be paid by the Commissioners at $2,047.20.

I dismiss the claim for damages for potential loss of a strip of land 10 feet wide on one side of the drain.

By consent costs to be ordered in the sum of $500.

Solicitors for the Claimant—*Braddell Bros.*

Solicitors for the Municipal Commissioners—

Drew & Napier.

* * * * *

[APPELLATE CIVIL JURISDICTION]

TAN HONG TEE vs. P. & O. BANKING CORPORATION.

[SINGAPORE SUIT No. 329 OF 1931]

[APPEAL No. 3 OF 1932]

Appeal to Privy Council. Stay of execution as to costs.

Where there are very exceptional circumstances the Court of Appeal will order a stay of execution as to costs on an appeal to the Privy Council unless the Solicitors for the successful party give an undertaking to refund such costs in the event of the appeal to the Privy Council being successful.

MOTION.

This motion was made to the Full Court of Appeal for stay of execution on appeal to the privy Council. Affidavits were filed alleging special circumstances which in effect amounted to allegations that if the appeal were successful the Respondent would not be in a financial position to comply with any order of His Majesty in